

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
)
COMPUTER NETWORK TECHNOLOGY)
CORPORATION, CONDOR ACQUISITION,)
INC. AND MCDATA CORPORATION)
)
For Merger and Transfer of)
Control of Computer Network)
Technology Corporation.)
_____)

DOCKET NO. 05-0019

DECISION AND ORDER NO. 21745

RECEIVED
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DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

Filed April 14, 2005
At 11 o'clock A.M.

Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

OF THE STATE OF HAWAII

In the Matter of the Petition of)
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COMPUTER NETWORK TECHNOLOGY)
CORPORATION, CONDOR ACQUISITION,)
INC. AND MCDATA CORPORATION)
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For Merger and Transfer of)
Control of Computer Network)
Technology Corporation.)
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Docket No. 05-0019

Decision and Order No. 21745

DECISION AND ORDER

By this Decision and Order, the commission: (1) waives the applicable requirements of Hawaii Revised Statutes ("HRS") §§ 269-7(a) and 269-19; and (2) waives the requirements of Hawaii Administrative Rules ("HAR") § 6-61-105, to the extent that COMPUTER NETWORK TECHNOLOGY CORPORATION ("CNT"), CONDOR ACQUISITION, INC, ("Condor") and MCDATA CORPORATION's ("McData") (collectively, "Petitioners") petition, filed on January 28, 2005 ("Petition") does not contain all of the information required under HAR § 6-61-105.

I.

Introduction

Petitioners request that the commission grant such authority as may be necessary or required to permit Petitioners to consummate a series of transactions, described in detail below, whereby (1) Condor, McData's wholly-owned subsidiary will be merged with and into CNT ("Proposed Merger"); and (2) control in CNT will

be transferred to McData resulting in CNT becoming a wholly-owned subsidiary of McData ("Proposed Transfer of Control"). Petitioners make their request, pursuant to HRS § 269-19.

Petitioners served a copy of the Petition on the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"). The Consumer Advocate filed its Statement of Position on February 17, 2005 ("Statement of Position") recommending that the commission waive its regulatory requirements authority under HRS § 269-7(a). In the alternative, if the commission is not inclined to waive the regulatory requirements of HRS § 269-7(a), the Consumer Advocate states that it does not object to the approval of the Proposed Merger and Proposed Transfer of Control, described above, subject to a qualification, discussed below.

II.

Background

A.

Overview of Subject Entities

CNT, a Minnesota corporation, is a public utility that holds a commission-issued certificate of authority ("COA") to provide intrastate telecommunications services within the State of Hawaii ("State" or "Hawaii") as a reseller and facilities-based carrier.¹ CNT's principal office and place of business is located in Minneapolis, Minnesota.

¹Decision and Order No. 20944, filed on April 30, 2004, in Docket No. 03-0412 ("Decision and Order No. 20944")

McData is a Delaware corporation, with its principal office and place of business located in Bloomfield, Colorado. Condor, a newly formed Minnesota corporation established to effectuate the Proposed Merger described in the Petition, is a wholly-owned subsidiary of McData. Neither McData nor Condor is authorized to provide intrastate telecommunications services in any state including Hawaii.

B.

Description of Proposed Merger and Proposed Transfer of Control

Petitioners' proposed transactions are generally described as follows: (1) Condor will be merged with and into CNT, whereby Condor will cease to exist and CNT will be the surviving corporation (aka, Proposed Merger); and (2) Control of CNT will be transferred to McData resulting in CNT becoming a wholly-owned subsidiary of McData (aka, Proposed Transfer of Control). In support of their Petition, Petitioners describe the Proposed Merger and Proposed Transfer of Control as follows:

1. These transactions "will increase competition in the Hawaii telecommunications market by reinforcing the status of CNT as a viable competitor";
2. These transactions "will minimize the disruption of service and be virtually transparent to CNT's customers";
3. These transactions are "expected to facilitate competition in Hawaii by improving the operational position of both CNT and McData"; and

4. These transactions "will not affect CNT's rates, terms and conditions of services" and "will have no negative effects on customers."²

Finally, Petitioners assert that because the Proposed Merger and Proposed Transfer of Control will serve the public interest, their Petition should be granted.³

C.

Consumer Advocate's Position

The Consumer Advocate suggests that the Proposed Merger and the Proposed Transfer of Control, described above, does not trigger HRS § 269-19 because the Proposed Merger "does not involve a merger of two utilities authorized to do business in the state of Hawaii" and the Proposed Transfer of Control does not result in transferring CNT's COA.⁴ Thus, in its Statement of Position, the Consumer Advocate asserts that it does not object to either the commission waiving the regulatory requirements under HRS § 269-7(a) or approving such transactions under HRS § 269-7(a). In support of its non-objection, the Consumer Advocate, among other things, states:

1. The Proposed Merger of CNT and Condor will not result in an undesirable accumulation of market power in the telecommunications market for which CNT is authorized to provide service because:

²Petition at 5.

³Id. at 5-6.

⁴Statement of Position at 3.

- a. Condor is not authorized to provide telecommunications services in the State; and
 - b. While CNT is authorized to provide intrastate telecommunication services as a reseller and facilities-based carrier, CNT currently does not have any customers in Hawaii.
2. The Proposed Transfer of Control will not impair CNT's ability to provide the service authorized under its COA. As discussed in the instant Petition, CNT will retain its COA and continue to provide telecommunication service subsequent to the consummation of the transfer under the same rates, terms and condition of service. The transaction is thus not expected to have any negative effects on customers; and
3. The Consumer Advocate recognizes that the entry of many telecommunications service providers in the Hawaii market may serve to mitigate any traditional public utility regulatory concerns that may result from the proposed merger and transfer of ownership of CNT. Therefore, if there are any adverse consequences from the proposed transactions, consumers in Hawaii will have the option of selecting another service provider.⁵

⁵ID. at 4-5 (footnotes omitted).

Upon review, we conclude that the both the Proposed Merger and the Proposed Transfer of Control fall under our purview under HRS § 269-7(a). We also agree with the Consumer Advocate that because the Proposed Transfer of Control does not result in transferring a COA from one legal entity to another legal entity, HRS § 269-19 is not applicable for that particular transaction.⁷ Nonetheless, contrary to the Consumer Advocate's position, we conclude that the regulatory requirements under HRS § 269-19 are applicable to the Proposed Merger.⁸

Notwithstanding the above regulatory requirements, HRS § 269-16.9 also permits the commission to waive regulatory requirements applicable to telecommunications providers if we determine that competition will serve the same purpose as public interest regulation. Specifically, HAR § 6-80-135 permits the commission to waive the applicability of any of the provisions of HRS chapter 269 or any rule (except provisions of HRS § 269-34 or provisions of HAR chapter 6-80 that implement HRS § 269-34), upon a determination that a waiver is in the public interest.

Upon review of the record in this docket, particularly Petitioners' representations, we find the following: (1) much of the telecommunications services currently provided by CNT are competitive; (2) CNT is a non-dominant carrier in Hawaii; (3) the Proposed Merger and the Proposed Transfer of Control are consistent

⁷Cf. *In re SBC Long Distance, Inc.*, Docket No. 04-0339, Decision and Order No. 21702 (March 22, 2005) (stating that a transfer of a COA from one legal entity to another legal entity triggers HRS § 269-19).

⁸See, *In re XO Long Distance Services, Inc. et al*, Docket No. 04-0177, Decision and Order No. 04-0177 (September 22, 2004).

))

with the public interest; and (4) competition, in this instance, will serve the same purpose as public interest regulation.

Based on the foregoing, the commission, on its own motion, will waive the requirements of HRS §§ 269-7(a) and 269-19, to the extent applicable, regarding the Proposed Merger and the Proposed Transfer of Control.⁹ Similarly, we also find it in the public interest to waive the applicability of HAR § 6-61-105 to the extent that the Petition in this docket is not in compliance with that particular provision. Thus, for purposes of considering this Petition, we will not require the information and documents normally required upon the filing of such Petition.

Notwithstanding the commission's waiver of the requirements noted above, our records do not indicate that CNT filed its revised tariffs consistent with the requirements set forth in Decision and Order No. 20944. Thus, the commission agrees with the Consumer Advocate's recommendation, and will require Petitioners to file CNT's revised tariffs with the commission and the Consumer Advocate in accordance with Decision and Order No. 20944.

⁹At the same time, the commission will continue to examine a utility's application or petition on a case-by-case basis to determine whether the applicable requirements of HRS §§ 269-7(a), 269-19 or any other related provision governing utility transactions, should be waived. The commission's waiver in this decision and order shall not be construed by any utility as a basis for not filing an application or petition involving similar transactions or circumstances.

IV.

Orders

THE COMMISSION ORDERS:

1. The requirements of HRS §§ 269-19 and 269-7(a), to the extent applicable, are waived with respect to the Proposed Merger and the Proposed Transfer of Control, subject to the applicable filing conditions described below.

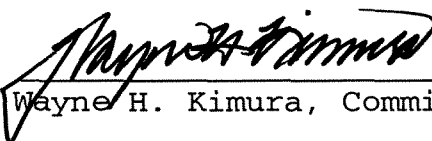
2. To the extent that the Petition does not contain all of the information required under HAR § 6-61-105, the applicability of this section is waived, subject to the applicable filing conditions described below.


3. Petitioners shall file CNT's revised tariffs with the commission and the Consumer Advocate in accordance with Decision and Order No. 20944. Petitioners shall promptly comply with the requirements set forth above. Failure to promptly comply with these requirements may constitute cause to void this decision and order, and may result in further regulatory action, as authorized by law.

DONE at Honolulu, Hawaii APR 14 2005.


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Kris N. Nakagawa
Commission Counsel
05-0019.ac

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21745 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
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Karen Higashi

DATED: APR 14 2005